

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, et. al.)	
)	
Plaintiff,)	
)	
v.)	Case No. 4:05-cv-00329-TCK-SAJ
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

STATE OF OKLAHOMA MOTION TO COMPEL DISCOVERY

COMES NOW the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA, and respectfully requests this Court for an order compelling discovery in accordance with the subpoenas issued to non-parties and as set forth in Exhibit 1 attached hereto. In support of this Motion, the State would show the Court as follows:

1. This motion to compel is bought pursuant to Fed. R. Civ. P. 45(c)(2)(B). The parties have conferred regarding the sampling request and related issues but have not reached an accord on them.
2. On or after April 17, 2006, the State served the subpoenas attached hereto and marked Exhibit 1 to various non-parties¹ who either have poultry operations or who have had recently stored or applied poultry waste on their land.

¹ One subpoena was issued to Hudson Foods, Inc. the legal title holder. That company was acquired by Tyson Chicken, Inc. See Docket entry #513 at n.3. Service of some subpoenas was also accomplished by acceptance of same by counsel.

3. On May 1, 2006, certain "non-party Poultry Growers," as that term is defined by them, filed "Objections and Motions to Quash Subpoenas for Inspection and Sampling of Premises Owned by Non-Parties, or Alternatively Motion for Protective Order and Brief in Support" (Docket #493).

4. On May 2, 2006 an additional non-party, Raymond C. Anderson and Shannon Anderson, through their counsel Carrie Griffith, served on the State's counsel an Objection to Subpoena. This objection was filed on May 4, 2006 (Docket # 536). Also on May 4, 2006, another non-party, Ren and Georgia Butler, filed an objection (Docket # 539) adopting the allegations in the Motion to Quash filed under Docket #493. Then on May 5, 2006 Tyson Chicken, Inc., filed its Objection and Motion to Quash (Docket #545).

5. On May 2, 2006, District Court Judge James H. Payne entered a minute order regarding the subpoenas issued from the Eastern District of Oklahoma stating, "Any objection to said subpoena should be filed in the Northern District of Oklahoma. . . ." Thus, it appears the venue to hear objections to subpoenas issued from both the Northern and Eastern Districts will be in the Northern District. A copy of the minute order is attached and marked Exhibit 2. The State intends that this motion apply to each subpoena set forth in Exhibit 1.

6. On March 23, 2006, at the conclusion of the hearing for expedited discovery requested by the State, the Honorable Sam A. Joyner stated:

This lawsuit is about whether or not the Illinois River watershed has been polluted by the application of chicken litter, so obviously the samples requested are relevant.

March 23, 2006, Transcript p. 82.

7. Due to the need to conduct discovery this Spring when heavy land application of poultry waste occurs and seasonal rains are common, the State requests an expedited hearing on its motion to compel.

8. Each subpoena is clearly not burdensome as it simply requires that the land owner allow access to the property for collection of the samples. There are three types of sampling requested. First, the geotechnical boring for ground water sampling will be temporary with no permanent structure, in accordance with all applicable State of Oklahoma Water Resource Board regulations. Second, the requested soil samples require only 6 inch deep, 3 inch wide cores grid spaced in ground of pasture land. A similar soil sample method is required of each landowner to be made in advance of land application of poultry waste on his/her property.

Third, for poultry waste sampling, the State will take samples from poultry houses from waste soaked litter in accordance with State of Oklahoma Department of Agriculture biosecurity guidelines. The State has offered to take the waste samples at a time immediately after removal of the flock for slaughter thereby avoiding biosecurity concerns. This requires, however, the Poultry Integrator Defendant's (the flock owner's) cooperation to notify the State's counsel sufficiently in advance of the flock removal in order to be present for collection of the waste samples. Finally, the edge of field sampling of rainfall water runoff from pasture land only requires access to field runoff areas on the property at times of rain. Though runoff collection needs to continue through the rainy season to June 30, 2006, the landowner can be notified reasonably in advance of any entry using an agreed upon ingress/egress plan. Clearly such sampling can not be considered an "undue

burden.” It is typical environmental sampling employed by the USEPA and all State environmental agencies to evaluate environmental impacts of waste disposal practices.

9. The vigorous objection to subpoenas advanced by the non-parties is misguided. The poultry industry and the use of the waste produced by the Poultry Integrator Defendants are subject to regulation in the State of Oklahoma. See The Oklahoma Registered Poultry Feeding Operation Act, tit. 2 O.S. §10-9.1 et. seq. (1998) and Administrative Rules at Chapter 35:12-5-1 et. seq.; The Oklahoma Poultry Waste Transfer Act tit. 2 O. S. §10-9.13 et. seq. The law and regulations require soil and poultry waste samples to be obtained. The method proposed for collection of waste and soil samples by the State is consistent to that which is required by these regulations.

10. The parties have attempted to resolve the Poultry Integrator Defendants biosecurity issues. Not all issues have been resolved but continued dialog is expected. Attached as Exhibit 3 is a compilation of correspondence outlining the positions of the parties regarding biosecurity protocols. The State requests the Court resolve any remaining issues at time of hearing this Motion in favor of the State because Poultry Integrator Defendants (for themselves and on behalf of non-party Poultry Growers) appear to be imposing new restrictions (not heretofore utilized by the industry) in an effort to further postpone or obfuscate reasonable discovery requests. Attached as Exhibit 4 is the Affidavit of Dr. Becky Brewer-Walker, D.V.M., the State Veterinarian and the Director of the Animal Industry Services Division of the Oklahoma Department of Agriculture, Food, and Forestry, along with the “Poultry Premise Entry Biosecurity Protocols for Regulatory Personnel,” which was previously furnished to non-party Poultry Grower’s counsel in

November 2005. The affidavit and its attachment fully support adequate biosecurity guidelines to be used by the State. Notwithstanding the lengths to which the State has gone to address the biosecurity issues raised by the non-party Poultry Growers and the Poultry Grower Defendants, the State has proposed to conduct waste sampling inside the poultry house when there is no flock present in the house. This proposal has gone unanswered.

11. In further support of this motion the State adopts its Response to Objections and Motion to Quash Subpoenas for Inspection and Sampling of Premises Owned by Non-Parties, or Alternatively, Motion for Protective order and Brief in Support, filed contemporaneously herewith.

WHEREFORE, premises considered, the State moves the Court for an expedited hearing and upon hearing this matter an order compelling immediate discovery on all the subpoenas issued by the State in accordance with the terms set forth therein, together with such other and further relief deemed just and equitable by the Court.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May, 2006, I electronically transmitted the attached document to the following:

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